84-1269

No.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

JOHN DEWITT,
Petitioner,

VS.

DEPARTMENT OF THE NAVY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. What constitutes an arbitrary, capricious or abuse of discretion action on the part of a federal agency, under 5 U.S.C. Section 7703 (c) in the discharge of a permanent federal civil service employee.

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

OCTOBER TERM, 1984

_____

JOHN DEWITT,
PETITIONER,

vs.

DEPARTMENT OF THE NAVY,
RESPONDENT.

_____

PETITION FOR A WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

_____

JOHN DEWITT, the Petitioner herein, prays that a writ of certiorari issue to review the judgement and opinion of the United States Court of Appeals for the Federal Circuit entered in this case on November 9, 1984.

OPINION BELOW

The opinion of the Court of Appeals on direct appeal is unpublished and is printed as "Appendix A" hereto.

JURISDICTION

The opinion of the Court of Appeals for the Federal Circuit was entered on November 9, 1984. This Court's jurisdiction is invoked under Title 28, United States Code, Section 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 5, United States Code, Section 7703(c).

STATEMENT OF THE CASE

Effective October 23, 1982, Petitioner, a federal civil service employee was removed from his position as Store Worker, WG-04, at the Supply Systems Command, Navy Commissary

Store, Department of the Navy ("the Agency"), Oakland, California. Petitioner was removed for unauthorized possession of $13.96 worth of government property. Prior to this removal, Petitioner had been a federal employee for eighteen (18) years. The last thirteen (13) years, Petitioner had been working at the Alameda Commissary Store in his position as Store Worker. Prior to this incident, which is the basis for his removal, the Petitioner had no disciplinary record or record of unsatisfactory performance during his entire eighteen (18) years as a federal civil servant.

Petitioner appealed his removal from the Agency to the U.S. Merit System Protection Board ("the Board") arguing in part, that the penalty of removal was too severe and amounted to an abuse of discretion on the part of the Agency. The Board upheld the Agency's removal action. Petitioner filed a timely appeal with the

Federal Circuit arguing again, in part, that the removal was arbitrary, capricious or an abuse of discretion. The Federal Circuit affirmed the removal.

REASON FOR GRANTING THE WRIT

I.

THE FEDERAL CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT. TO WIT, THE CIRCUMSTANCES UNDER WHICH A REMOVAL IMPOSED UPON A FEDERAL CIVIL SERVICE EMPLOYEE IS ARBITRARY, CAPRICIOUS OR AN ABUSE OF DISCRETION

In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold

unlawful and set aside any agency action, findings, or conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. (5 U.S.C. Section 7703 (c)(1984).)

In order for an Agency's penalty to meet the standard under Title 5, United States Code, Section 7703(c), the appellate court must be satisfied that the penalty "was based on a consideration of the relevant factors and [that] . . .there has [not] been a clear error of judgment." Cf. Citizens to Protect Overton Park, Inc. v. Volpe, 401 U.S. 402, 417 (1971). The expression "clear error of judgment" has been found to mean that "when although there is evidence to support it, the court. . .is left with the definite and firm conviction that a mistake has been committed." Hernandez v. United States, 636 F.2d 704, 707 (D.C. Cir. 1980), quoting United States

v. Gypsum Co., 333 U.S. 364, 395 (1948). See, also, Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 285 (1974); Amer. Optometric Ass'n v. FTC, 626 F.2d 896, 905 (D.C. Cir. 1980)

This Court has not articulated any specific principles, rules, or standards beyond "relevant factors" and "clear error of judgement" in applying Section 7703 (c). This Court has not provided guidance as to what those relevant factors should be and what standards should be used to determine whether a clear error of judgment has been made. Such guidance is necessary to clarify what appears to be a conflict in the holding of the Federal Circuit in this case, with that of previous rulings.

The Federal Circuit has stated that while unauthorized possession of government property is a serious offense and that it should not be condoned regardless of the value of the property involved, the de

minimus value of the objects taken does reflect on the appropriateness of a removal penalty. See, Miguel v. Department of Army, 727 F.2d 1081, 1084 (Fed. Cir. 1984). In Miguel, the removal of an employee working as a commissary cashier for the admitted theft of $2.10 worth of soap was held to be unlawful. The court stated that "the relatively minor nature of the theft leads us to the conclusion that this harsh discharge of a 24-year employee with an otherwise unblemished record was a penalty grossly disproportionate to the offense and thus was an abuse of discretion" (Id.). Likewise, in Power v. United States, 531 F.2d 505 (Ct. Cl. 1976), the court found that an excessive claim of rent and meal expenses amounting to $66.47 was de minimus in nature and did not warrant the removal of a government employee with an unblemished record of twenty-five years of service. Id. at 509 and n.5.

Not only has the Federal Circuit recognized a distinction between penalties for offenses involving minor amounts of money or property, but this distinction has also been recognized by the removing Agency and the Board. (Removal penalty is unreasonable where unauthorized claim and receipt of $53.04 determined to be "small amount." Yoder v. Department of Air Force, 7 MSPB 634 (1981) Penalty of reduction of grade imposed instead of removal where unauthorized possession of government property consisted of an "angle grinder and a socket." Fox v. Department of the Navy, 6 MSPB 292 (1981).) Yet, despite this recognition, Petitioner was removed for the unlawful possession of government property valued at $13.96. This was Petitioner's first offense in eighteen (18) years as a federal civil service employee and the first in thirteen (13) years as a store worker of the Alameda Commissary Store.

Moreover, unlike Miguel where theft was admitted Miguel, supra at 1082, here Petitioner unequivocally denied taking the items found in his possession. In fact, the Agency had serious doubts that any wrong-doing had occurred. First, it was unsure whether the food items found in Petitioner's possession were government property . Second, it returned to Petitioner the items found in his possession. Finally, it did not take any action against Petitioner until three (3) months later, long after the food items had been consumed. To impose the most severe penalty for a first offense involving de minimus property value is clearly an abuse of discretion under the facts of this case. The ruling of the Federal Circuit in this case is clearly in conflict with its rulings in prior de minimus cases most notably Miguel and Power.

The Federal Circuit ruling is also in conflict with prior rulings involving the

imposition of a removal penalty for low level federal civil service employees. The Federal Circuit in its opinion in Dewitt v. Department of the Navy relies on James v. Department of the Navy, 83 FMSR 5000 (MSPB 1983) to support its conclusion that Petitioner's misconduct was serious enough to warrant removal for the first offense even though no prior disciplinary record was cited by the Agency (See Appendix A at A-26). In James however, the removal was upheld because as a supervisor Mr. James was charged with the responsibility of ensuring that his subordinates complied with established Agency rules and regulations including Agency regulations against theft of government property.

While the Federal Circuit has upheld harsh penalties against supervisory employees for minor offenses, they have been reluctant to impose the same harsh penalties against low-level civil service employees.

Compare, for example, Giles v. United States, 553 F.2d 647 (Ct. Cl. 1977), in which removal of a GS-11 employee was upheld for failure to file timely federal and state income tax returns and Boyce v. United States, 543 F.2d 1290 (Ct. Cl. 1976), where the removal of two I.R.S. GS-2 and GS-3 employees was reversed for failure to file federal tax returns. In Boyce, the court rejected the Agency's argument that the same rigid standards should apply to GS-2 and GS-3 file clerks as to GS-11 agents. Id. at 1297.

The present case is virtually indistinguishable from the Federal Circuit's holdings in Boyce on this issue. Here Petitioner was employed as a WG-04 store worker whose job it was to stock grocery shelves at the Navy Commissary during the hours of 1:30 a.m. to 10:00 a.m.. Petitioner is a low-level employee who, on behalf of the Agency, has no contact with the public or Navy personnel in general.

Due to his relatively low-level position within the federal bureaucracy, the public would not draw the same conclusions from the transgression of Petitioner, as it would from a similar one which, in a purely hypothetical case, might be committed by a managerial or supervisory employee. See Boyce, supra. at 1297. Indeed, the Federal Circuit's predecessor Court of Claims has warned that should a powerful governmental agency seek the severe penalty of dismissal for every de minimus offense of a low-level civil service employee, not only would the goal of deterrence suffer, but potential employees would be deterred from seeking positions with the federal government. Boyce, supra at 1295.

In this era of record-high unemployment and scarce employment opportunities, dismissal for wrongful conduct may be equivalent to an economic death sentence for the employee. It is not a penalty to be lightly

ordered or routinely upheld. It should be reserved for the most serious of offense or for cases in which it has been demonstrated that lesser punishment is ineffective. Here, the Federal Circuit affirmed the ultimate sanction even though Petitioner's lengthy work record is void of any prior disciplinary problems and involves property valued at less than fourteen dollars ($14.00). Petitioner maintains that under these facts the punishment of removal is so disproportionate to the offense that it is arbitrary, capricious and constitutes an abuse of discretion.

This court should grant Mr. DeWitt's Petition in order to clarify what constitutes an arbitrary, capricious or abuse of discretion removal action under 5 U.S.C. Section 7703 (c). Such a grant will foreclose future idiosyncratic applications of that statute by the Federal Circuit in degradation of Petitioner's federal civil service employment rights.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Federal Circuit.

DATED: January 28, 1985

Respectfully submitted,

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APPENDIX "A"

OPINION OF THE COURT OF APPEALS

JOHN V. DEWITT

Petitioner

v.

DEPARTMENT OF THE NAVY

Defendants

NO. 84-959

United States Court of Appeals
Federal Circuit
December 9, 1984

Before: MARKEY, Chief Judge, NICHOLS, Senior Circuit Judge, and BISSEL, Circuit Judge.

BISSELL, Circuit Judge.

John DeWitt (DeWitt) petitions this court for review of a final decision of the Merit Systems Protection Board (Board), Docket Number SF07528310150. The Board sustained his removal for unauthorized possession of government property. We affirm.

BACKGROUND

DeWitt was employed by the Department of the Navy (agency) as a Store Worker, WG-4, stocking shelves in the commissary. The agency charged him with unauthorized possession of government property because he took from the commissary various grocery items worth approximately fourteen dollars. For the efficiency of the service the agency removed him. 5 U.S.C. S 7513a.

On Saturday, May 22, 1982, a supervisor noticed DeWitt acting in a peculiar manner and then departing the store with an unusually large bulge under his smock. The supervisor notified the commissary store officer who contacted the base police. When the patrolmen arrived they informed DeWitt that he was suspected of taking items from the commissary and placing them in his car.

He denied that he had taken anything from the commissary and said that he "had not done anything wrong." DeWitt consented to a search of his car, but on the way to the car he deceived the patrolmen with a ruse and fled the scene. After a day-long surveillance of his car it was impounded. On Sunday, May 23, 1982, DeWitt arrived to claim the car. He again consented to a search of the car which produced still partially frozen fish and turkey, three boxes of plastic bags, and five bars of soap. Conflicting statements were made at this time and during the subsequent investigation about the purchase of these items at local commercial stores.

The agency then conducted a painstaking investigation, including interviews with DeWitt, his supervisors and co-workers, and price comparisons of items at the commissary and neighborhood stores. The investigation

revealed that the labels and prices on the items in DeWitt's car were identical to those in the commissary and were different from those in the commercial stores. Furthermore, these stores did not even stock some of the items.

At the Board hearing, DeWitt again denied taking the items. He admitted that he left the premises when first confronted by security. Although he testified that he did so because he had loaded gun in his car and was afraid he would get in trouble if it were found by security, it is undisputed that in their thorough search the base police found no such weapon. With regard to the items found, DeWitt offered no explanation. He testified that he had purchased fish at a Food Bowl on May 20, 1982. Upon further questioning, he admitted that the

partially frozen fish found on May 23, 1982, were not the same fish. When asked specifically where the items came from, he testified that he did not know.

The Board's Findings and Decision

A. The Charge.

The Board noted that there was no dispute that there was no dispute that the items were found in DeWitt's car. Additionally, the agency's evidence established that the items were commissary store items.

In determining DeWitt's culpability, the Board gave little weight to his denial for the following reasons. First, his flight when confronted by security indicated a consciousness of guilt on his part. His explanation for his flight, that he had a loaded gun in his car, was unbelievable. The security officers did not find a gun in his car after a thorough search. Although DeWitt testified that the gun was still in

his console when he finally retrieved his car, the Board did not believe that the officers would fail to note it in their reports. Thus, the Board found that his flight was circumstantial evidence of his guilt. The Board further found that his credibility was significantly diminished by his obviously fabricated explanation for his flight.

Second, the Board found it totally incredible that he had no plausible explanation for how the items found their way into his car. The Board also found that the fact the items were found in his car was persuasive evidence that he put them there. The Board considered all that evidence and the conflicting statements DeWitt made and found that it was more likely true than untrue that DeWitt took the items. The Board thus sustained the charge.

B. The Penalty.

The Board found the following factors relevant to the selection of a penalty: (1) DeWitt's length of service and past work record; (2) the nature and seriousness of the offense; (3) the fact that DeWitt's conduct was intentional; and (4) the special position of trust occupied by DeWitt as a store worker.

Although DeWitt had worked at the agency for over thirteen years, the Board found that the agency's removal penalty was neither arbitrary nor unreasonable under the circumstances. Further, based on Jones v. Department of the Navy, 83 FMSR 5000 (MSPB 1983), this misconduct was serious enough to warrant removal for the first offense even though no prior disciplinary record was cited by the agency. Finally, the Board found no reason for mitigation sufficient to disturb the agency's decision.

OPINION

DeWitt asserts (1) that the Board erred in concluding that his flight established guilt; and (2) that the penalty imposed was so disproportionately harsh that it was an abuse of discretion.

This court's scope of review is limited by 5 U.S.C. S 7703 (c). We affirm a decision to dismiss a federal employee if the "decision complies with the applicable statute and regulations and [if] it has a rational basis supported by substantial evidence from the record taken as a whole." Hayes v. Department of the Navy, 727 F.2d 1535, 1537 (Fed. Cir. 1984).

I

There is no dispute that the items were found in DeWitt's car and he does not contest the Board's finding that those

items, some still partially frozen, came from the commissary. Rather, he disputes the Board's conclusion of "unauthorized possession." He argues essentially that he was not the one who took the items out of the commissary and put them in his car, that the agency failed to prove the element of intent, and that the Board improperly considered his flight as evidence of guilt.

In criminal cases it is well settled that flight can be probative evidence of guilt. Allen v. United States, 164 U.S. 492, 499 (1896); United States v. Martinez, 681 F.2d 1248, 1256 (10th Cir. 1982); United States v. Meyers, 550 F.2d 1036, 1049 (5th Cir. 1977). In administrative cases circumstantial evidence can be used to prove the elements of a charge, including the element of intent. See Schapansky v. Department of Transportation, FAA, 735 F.2d 477, (Fed. Cir. 1984), petition for cert. filed, 53

U.S.L.W. 3160 (U.S. Aug. 16, 1984) (No. 84-258). Whether flight alone would be sufficient circumstantial evidence in an administrative proceeding is a question not before us because the Board considered other factors. In light of the location of the items, DeWitt's conflicting statements, and his lack of a plausible explanation, the Board concluded that the charge was "more likely true than untrue." We have carefully reviewed the record and the briefs and we are persuaded that even without considering DeWitt's flight the Board's decision is supported by "such relevant evidence as a reasonable mind might accept as adequate support [its] conclusion." Brewer v. United States Postal Service, 647 F. 2d 1093, 1096 (Ct. Cl.) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)), cert. denied, 454 U.S. 1144 (1982). Therefore, the Board did not err in substaining the agency's charge.

II.

DeWitt argues that the penalty of removal was so harsh and disproportionate to an offense of unauthorized possession of approximately fourteen dollars worth of groceries that it was an abuse of discretion. Under the facts of this case, we disagree.

The choice of penalty for employee misconduct is left to the agency's sound discretion. Miguel v. Department of the Army, 727 F. 2d 1081, 1083 (Fed. Cir. 1984). This court will not disturb the Agency's choice unless the severity of its action appears totally unwarranted in light of the relevant factors. Brewer, 647 F.2d at 1098. Though the penalty here was severe, we cannot say it was totally unwarranted in light of all the facts because the record reflects a reasoned concern for the factors appropriate to evaluating a penalty. While

this case differs from Miguel, "Whether in a given case the penalty imposed by the agency amounts to an abuse of discretion depends upon the unique circumstances of each case. 727 F.2d at 1083.

In Miguel, the agency abused its discretion because it did not base its decision on the unique circumstances of the case. Instead, there was "little recognition" of those circumstances apparently because "it was the policy of the deciding official to impose the maximum penalty for all thefts regardless of the agency guidelines." 727 F.2d at 1084 n.1. Similarly, in Ross v. United States, 229 Ct. Cl. 755 (1982), the employee alleged an agency policy of "dismissal for any employee found to have converted government property, no matter what the surrounding circumstances ." 229 Ct. Cl. at 757. The court observed that the employee alleged facts indicating that the

agency selected his penalty based on that policy and not based on "an objective evaluation of the circumstances surrounding his offense." Id. at 759.

It is this refusal to consider the peculiar facts of the case that is the essence of the abuse. In DeWitt's case, however, there is no abuse because the penalty was based on a responsible balancing of the factors outlined in Douglas v. Veterans Administration, 5 MSPB 313 (1981).

On a factual level, this case is distinct from Miguel in three significant factors. First is the control factor. DeWitt's job duties involved stocking the commissary shelves. Thus, he occupied a position of control and custody over the items he took. In Miguel, on the other hand, the employee was a commissary cashier who was in a position of control with resp-

ect to the cash in the register, but not with respect to the items she took from a cabinet in the manager's office.

In evaluating the agency's choice of penalty, it was not inappropriate for the Board to consider this control factor. In two recent unauthorized possession cases where the employee was in a position of trust, the penalty of removal was upheld. Book v. United States Postal Service, 675, F.2d 158 (8th Cir. 1982) (demonstrated lack of trustworthiness was directly connected to employee's job performance and position); Jones v. Department of the Navy, 83 FMSR # 5009 (MSPB 1983) (Removal an appropriate penalty since the employee's honesty and integrity were important to the agency in view of the position of trust he occupied in the care and control of the items he was charged with stealing).

It is not just the dollar amount of the theft but the attitude of the employee that matters. Where an employee takes unauthorized personal possession of property entrusted to his care and reponsibility the breach of trust is difficult to repair. Nevertheless, the agency does not assert and we do not hold that every store worker who takes unauthorized possession of property over which he exerts control and custody must be removed. See Brewer, 647 F.2d at 1098 (dictum).

Second is the guideline factor. In Miguel, that agency's table of penalties stated that the choice of penalty "will be determined primarily by value of articles stolen." 727 F.2d at 1084. Here, however, there was no such restriction on discretion. The agency's guideline here authorizes a penalty outside the general range depending on the circumstances.

Contrition is the third factor. In Miguel, when that agency accused the employee of theft she replied in effect, "I have done a bad thing, I should not have done it." 727 F.2d. at 1082. Here, however, when the agency informed DeWitt that he was suspected of stealing government property, he denied any wrongdoing. Subsequently, he deceived investigating officers and gave testimony at the hearing which the Board found was "obviously fabricated".

"The fifth amendment privilege against compulsory self-incrimination may be asserted in an administrative investigation to protect against any disclosures that an individual reasonably believes could be used in his own criminal prosecution. . . ." Weston v. Department of Housing and Human Development, 727, F.2d 943, 947-48 (Fed. Cir. 1983) (citing Kastigar v. United Staes, 406 U.S. 441, 444-45 (1972)). But

instead of asserting a fifth amendment privilege, DeWitt misled investigators and gave false testimony at the hearing. It was not improper for the Board to consider these facts when it evaluated the agency's choice of penalty.

We have thoroughly analyzed the matters before us; we cannot say that the decision to remove DeWitt was arbitrary, capricious, our unsupported by substantial evidence. Finding no error of law and no abuse of discretion, we affirm.

AFFIRMED

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JOHN DEWITT,
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On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

SUPPLEMENTAL APPENDICES TO PETITION FOR WRIT OF CERTIORARI

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26 pp

SUPPLEMENTAL APPENDIX "A"

OPINION OF MERIT SYSTEMS PROTECTION BOARD

JOHN DE WITT
Petitioner

v.

DEPARTMENT OF THE NAVY
Respondent

NO. SF07528310150

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
SAN FRANCISCO REGIONAL OFFICE
August 22, 1983

Before: PHYLLIS J. HAMILTON
Presiding Official

INTRODUCTION

By petition filed November 12, 1982, appellant, John DeWitt, appealed his removal by the Naval Supply Center, Oakland, California, from his position of

Store Worker, WG-4, effective October 23, 1982.

JURISDICTION

The Board has jurisdiction over this appeal pursuant to 5 U.S.C. Sections 7511(a)(1)(A) and 7512.

LAW, ANALYSIS, AND FINDINGS

General Law

To prevail in an adverse action based on misconduct, the agency must prove by a preponderance of the evidence that (1) the misconduct charged occurred, and (2) that the discipline imposed promoted the efficiency of the service. 5 U.S.C. Section 7513(a) (1980); Allen v. U.S. Postal Service, 2 MSPB 582 (1980). The efficiency of the service requirement involves a determination that there was a suffi-

cient connection between the charges and a legitimate government interest so that some discipline was warranted and a determination that the particular penalty fell within the limits of reasonableness. Douglas v. Veterans Administration, 5 MSPB 313 (1981). Thus the agency must show that the claimed misconduct occurred, discipline was warranted, and the penalty imposed was reasonable. Id.

Occurrence of Conduct

Appellant was removed for unauthorized possession of government property. Appellant was formerly a commissary worker at the Alameda Naval Supply Center store. The items he was charged with possessing were food and sundry items from the com-

missary which were found in his car on May 23, 1982.

In support of the charge, the agency submitted various reports of the investigating security officers and reports of the JAG officer assigned to conduct an administrative investigation and to make a recommendation regarding disciplinary action. Several but not all of the preparers of the various reports appeared at the hearing. The testimony of those witnesses and the record evidence establish the following.

On the evening of May 22, 1982, Robert Onweller, the Supervisor of the Meat Department, observed appellant walking through the store and stopping at various points. Mr. Onweller saw what he

believed to be an unusually large bulge under appellant's smock. Appellant left the store and went to his car in the commissary parking lot. Mr. Onweller reported his suspicion that appellant had stolen something to the store officer, Lt. Arcemont, who requested the base security to send assistance.

One of the responding officers, Patrolman Whitt, testified that he spoke with appellant upon his arrival at the store. Appellant denied having taken anything and consented to a search of his car. Appellant wanted to go to the rest-room before he went back to his car. Officers waited at appellant's car for him and he did not appear. At the end of the day, his car was towed to the security lot

and impounded. Appellant attempted to obtain his car later that evening, but security would not release it to him because he was intoxicated.

The following day, appellant contacted security about his car. Patrolman Dindleback testified that after appellant and his wife paid the towing fee, the car was searched upon appellant's consent. Patrolman Dindleback participated in the search and discovered the following items: partially frozen fish and turkey, soap, drano, and plastic bags.

Various statements were made by appellant and his wife at this time and during the subsequent investigation. Mrs. DeWitt said that a friend of hers with commissary privileges put the fish in

the car. She also said that she purchased some of the things at a Safeway Store in Richmond. Appellant stated that he purchased some of the items at the Food Bowl Store in Richmond.

Donald Patino, the JAG officer in charge of the investigation, testified that he compared the labels of the products found with the labels utilized by the Food Bowl. He was familiar with the labels used by Safeway because he normally shopped at those stores. Based upon the differences in the labels used by Navy Commissary stores and those used by commercial stores and the fact that the prices matched commissary food price lists to the cent, he determined that the items were in fact from the commissary. Iden-

tification was somewhat of a problem because the security officers released the items to appellant. They were not positive about the source of the items and were unsure about how to proceed with civilians because of the threat of civil liability. The record contains photocopies of the type of labels utilized by Safeway, Food Bowl, and the commissary stores (Agency File, Tab 2S). The commissary store labels are obviously different from the others.

Appellant denied taking the items found. He testified that the bulge observed by Mr. Onweller was merely his labeling gun which was stuck in a pocket under his jacket. He admitted that he left the premises when first confronted by

security. He testified that he did so because he had a loaded gun in his car and was afraid he would get in trouble if it were found by security. With regard to the items found, appellant offered no explanation. He testified that he had purchased fish at the Food Bowl on May 20, 1982. Upon further questioning, he admitted that the partially frozen fish found on May 23, 1983, was not the same fish. When asked specifically where the items came from, he testified that he did not know but assumed his wife left them in the car. When asked what his wife's explanation was, appellant testified that he never specifically asked his wife if she left the items. Neither appellant's

wife nor her friend who allegedly left the items in the car, appeared at the hearing.

There is no dispute that the items were found in appellant's car. Thus the issues to be determined are whether the items were from the commissary and whether appellant's possession was unauthorized, in other words whether he stole the items. Regarding the first issue, the agency's evidence shows that the labels of the items found match commissary labels and do not match several commercial store labels. In addition, the prices on each item found were exactly the same prices as those noted on the commissary price list for all of its stock. I find this evidence persuasive, particularly in view of appellant's testimony that he does not know

where the items came from. I also have considered the fact that the food items were still partially frozen on May 23, which is consistent with them having been placed in a car while frozen solid the evening before. Thus, I find that the items found in appellant's car were commissary store items.

With regard to appeallant's theft, I give little weight to his denial for the following reasons. First, appellant's flight when confronted by security indicates a consciousness of guilt on his part. Appellant's explanation for his flight, that he had a loaded gun in his car, is unbelievable. The security officers did not find a gun in the car after a thorough search. Although appel-

lant testified that the gun was still in his console when he finally retrieved his car, I do not believe that the officers would fail to take action based upon that violation of the law or at the very least note it in their reports. Thus, I find that appellant's flight is circumstantial evidence of his guilt. I further find that his credibility is significantly diminished by his obviously fabricated explanation for his flight.

In addition, I find it totally incredible that a person faced with loss of his job would not find out on his own where the stolen items came from. Yet appellant testified that he did not even talk to his wife about where the items came from. If there was a plausible

explanation for how the items found their way to appellant's car, he did not present it. A reasonable person, under the circumstances, would have done so. The fact that the items were found in appellant's car is persuasive evidence that he put them there. This evidence, when considered with evidence of his flight, the conflicting statements made by him before the hearing, and the absence of an explanation at the hearing, persuades me that it is more likely true than untrue that appellant stole the items. Thus, I find that the agency has met its burden of proof. The charge is sustained.

Efficiency of the Service

The evidence establishes that there is a sufficient connection between the

charge and the efficiency of the service so that a penalty is warranted. In Phillips v. Bergland, 586 F.2d 1007 (4th Cir. 1978), the courts stated that theft of government property has an obvious impact on the efficiency of the service.

This Board has consistently held that "....an act which goes to (the employee's) reliability, veracity, trustworthiness, and ethical conduct...certainly affect the efficiency of the service." Warner v. Department of the Navy, 4 MSPB 413 (1980). Similarly, in Dennis v. Department of the Navy, 5 MSPB 313, at 346 (1981), the Board citing Phillips, supra, held that theft of government property "carries on its face prejudice to the service," and is "without question related to the faithful

and loyal performance of an (employee's) duties."

The purpose of the Board's review of the penalty is to assure that the agency conscientiously considered the relevant factors and, in choosing the penalty, struck a responsible balance within the limits of reasonableness. Douglas, supra, at 331. Factors I find relevant to the selection of penalty here are: 1) appellant's length of service and past work record; 2) the nature and seriousness of the offense; 3) the fact that appellant's conduct was intentional; and, 4) the special position of trust occupied by appellant as a Store Worker.

Although appellant had worked at the agency for over thirteen years, I find

that the agency's removal penalty was neither arbitrary nor unreasonable under the circumstances of this case. Further, even though no prior disciplinary record was cited by the agency, this offense is so serious as to warrant removal for the first offense. The Board in Jones v. Department of the Navy, MSPB Docket No. AT07528110479 (January 7, 1983), found that removal was an appropriate penalty for the theft of government property since the appellant's honesty and integrity were of particular importance to the agency in view of the position of trust occupied by the appellant in the care and the control of the very goods that he was charged with stealing.

Accordingly, I find no reasons in mitigation sufficient to disturb the agency's decision in this case.

Finally, appellant alleged harmful procedural error because the agency directed the JAG officer to conduct the administrative investigation and not the Naval Intelligence Service (NIS). The appellant has the burden of proving the action was harmful to him. 5 C.F.R. Section 1201.56(b)(1). Appellant presented no evidence of argument to establish the harm suffered by him. Preliminary to proof of harm, however, is a showing of error. Svejda v. Department of the Interior, 7 MSPB 36 (1981). It was appellant's position that the agency was required to go to NIS first. One of the

agency witnesses confirmed that indeed that was the general practice. However, no evidence was presented that that procedure was a requirement under law, rule, or agency regulations. Thus, I find that appellant has failed to meet his burden of proof on this affirmative defense.

Having found that the removal action is supported by a preponderance of the evidence, that it promotes the efficiency of the service, and that there was no harmful error committed by the agency, the action is sustained.

DECISION

The removal action is AFFIRMED.

This decision is an initial decision and will become a final decision of the Merit Systems Protection Board on

September 26, 1983 unless a petition for review is filed with the Board within 35 calendar days of issuance of this decision.

Any party to this appeal, the Director of the Office of Personnel Management and the Special Counsel may file a petition for review of this initial decision with the Merit Systems Protection Board. The petition shall set forth objections to this decision, supported by references to applicable laws or regulations, and with specific reference to the record.

The petition for review must be filed with the Secretary of the Merit Systems Protection Board, 1120 Vermont Avenue, N.W., Washington, D.C. 20419. An infor-

mation copy of the petition should be filed with the Presiding Official at the San Francisco Regional Office.

The Board may grant a petition for review when a party submits written argument and supporting documentation which tends to show that:

(1) New and material evidence is available that, despite due diligence, was not available when the record was closed; or

(2) The decision of the Presiding Official is based upon an erroneous interpretation of statute or regulation.

The Director of the Office of Personnel Management may file a request for review only if he/she is of the opinion

that the decision is erroneous and will have substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office. 5 U.S.C. Section 7701(e)(2).

Pursuant to 5 U.S.C. Section 7703(B)(1) * The appellant has the right to seek judicial review of the Board's final decision on this appeal. A petition requesting such review must be filed with the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20005. Such a petition may not be filed while the case is pending

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* As modified by Section 127 of the Federal Courts Improvement Act of 1982 to be codified at 28 U.S.C. Section 1259(a)(9).

before the Board. To be timely, the petition for judicial review must be received by the Court within 30 days of the final Board decision.

FOR THE BOARD:

PHYLLIS J. HAMILTON
PRESIDING OFFICIAL

SUPPLEMENTAL APPENDIX "B"

ORDER OF MERIT SYSTEMS PROTECTION BOARD

JOHN DE WITT
Petitioner

v.

DEPARTMENT OF THE NAVY
Respondent

NO. SF07528310150

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
SAN FRANCISCO REGIONAL OFFICE

Before: PHYLLIS J. HAMILTON
Presiding Official

ORDER

Having fully considered the appellant's petition for review of the initial decision issued on August 22, 1983, and finding that it does not meet the criteria for review set forth at 5 C.F.R.

§ 1201.115, the Board hereby DENIES the petition.*/

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this order. 5 C.F.R. § 1201.113(b).

The appellant is hereby notified of the right under 5 U.S.C. § 7703 to

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*/ Appellant's allegations primarily constitute a disagreement with certain factual findings and conclusions made by made by the presiding official, and are not sufficient to warrant a full review of the record. See Weaver v. Department of the Navy, 2 MSPB 297 (1980).

Appellant has not shown "harmful" error by the agency. See Parker v. Defense Logistics Agency, 1 MSPB 489 (1980).

Appellant has made no showing of disparate treatment. See Woody v. General Services Administration, 6 MSPB 410 (1981).

seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

_____ _____

Robert E. Taylor

Washington, D.C. Secretary